STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 31, 2013
v	No. 310779 Macomb Circuit Court
CHARLES E. BENTLEY, Defendant-Appellant.	LC No. 2009-000924-FC

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b)(*ii*) (victim at least 13 but less than 16 years of age and related to actor), and one count of second-degree CSC, MCL 750.520c(1)(b)(*ii*) (victim at least 13 but less than 16 years of age and related to actor). He was sentenced to 10 to 40 years' imprisonment for each first-degree CSC conviction, and 10 to 15 years' imprisonment for the second-degree CSC conviction. We affirm.

Defendant first argues that his trial counsel, Timothy Barkovic, rendered ineffective assistance when he failed to communicate the information necessary to allow defendant to make an educated decision with respect to a plea offer. We disagree.

"Whether [a] defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. We review for clear error a circuit court's findings of fact. We review de novo questions of constitutional law." *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012). The United States and Michigan Constitutions guarantee criminal defendants the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). Criminal defendants have a Sixth Amendment right to effective assistance of counsel during plea negotiations. See *Lafler v Cooper*, ___ US ___; 132 S Ct 1376; 182 L Ed 2d 398 (2012), slip op at 3; *Missouri v Frye*, ___ US ___; 132 S Ct 1399; 182 L Ed 2d 379 (2012), slip op at 8. "A claim of ineffective assistance of counsel may be based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a plea offer." *People v Douglas*, 296 Mich App 186, 205; 817 NW2d 640 (2012), lv gtd 493 Mich 876 (2012), citing *Hill v Lockhart*, 474 US 52, 57-58; 106 S Ct 366; 88 L Ed 2d 203 (1985).

"To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008). Defense counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Vaughn*, 491 Mich at 670, and is given "wide discretion in matters of trial strategy," *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

The United States Supreme Court recently explored whether the Sixth Amendment right to effective assistance of counsel applies in the context of plea negotiations, as well as what is sufficient to discharge counsel's duties arising out of that right, in two companion opinions written by Justice Kennedy. In *Frye*, the defendant was charged with driving with a revoked license, a felony that carried a maximum penalty of four years' imprisonment since it was his fourth such offense. *Frye*, slip op at 2. The prosecution extended two offers to the defendant's attorney, the first of which was "to recommend a 3-year sentence if there was a guilty plea to the felony charge, without a recommendation regarding probation but with a recommendation that [the defendant] serve 10 days in jail," and the second of which was "to reduce the charge to a misdemeanor and, if [the defendant] pleaded guilty to it, to recommend a 90-day sentence." *Id.* The attorney did not discuss the offers with the defendant, and the offers expired. *Id.* Less than one week before the defendant's preliminary hearing was scheduled, he was arrested a second time for the same offense. *Id.* He pleaded guilty to the first charge, and the trial court accepted the guilty plea and the prosecution's sentencing recommendation, which was identical to the terms of the first offer above. *Id.* At a post-conviction evidentiary hearing, the defendant testified that he would have accepted the second offer had he known about it. *Id.*, slip op at 3. Noting that "[t]he potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties," the Court held that, "[i]n order that these benefits can be realized, . . . criminal defendants require effective counsel during plea negotiations." *Id.*, slip op at 8. Turning to counsel's responsibilities in the plea bargaining process, the Court held that, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id.*, slip op at 9.

The *Frye* Court acknowledged that its ruling could prompt "late, frivolous, or fabricated claims . . . after a trial leading to conviction with resulting harsh consequences," and offered three measures that could be taken to neutralize those unmeritorious claims:

> First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. See N.J. Ct. Rule 3:9–1(b) (2012) ("Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant's attorney"). Third, formal offers can be made

> part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence. [*Id.*, slip op at 10.]

To satisfy the prejudice element of the two-pronged *Strickland* test for ineffective assistance of counsel "where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel" and "a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Frye*, slip op at 11. Because the record in *Frye* showed that the defendant's attorney "did not make a meaningful attempt to inform the defendant of a written plea before the offer expired," satisfying the deficient-performance prong of the *Strickland* test, and there was a "reasonable probability that [the defendant] would have accepted the prosecutor's original offer of a plea bargain if the offer had been communicated to him," the Supreme Court vacated the defendant's guilty plea and remanded for a determination whether, had the defendant accepted the offer, it "would have been adhered to by the prosecution and accepted by the trial court." *Id.*, slip op at 14.

In *Lafler*, the defendant was charged, as a habitual offender, with three felonies and one misdemeanor. *Lafler*, slip op at 2. The prosecution offered to dismiss two of the four charges and recommend a sentence of 51 to 85 months' imprisonment in exchange for the defendant's agreement to plead guilty to the other two charges. *Id.* The defendant initially informed the trial court that he intended to accept the offer, but later rejected it, "allegedly after his attorney convinced him that the prosecution would be unable to establish his intent to murder [the complainant] because she had been shot below the waist." *Id.* The prosecution extended a less favorable offer on the first day of trial. *Id.* The defendant rejected this second offer, was convicted on all counts, and was sentenced to a mandatory minimum sentence of 185 to 360 months' imprisonment. *Id.*

The Court held that, where ineffective advice leads to rejection of a plea offer,

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. [*Id.*, slip op at 5.]

Rejecting the prosecution's argument that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining," the majority held that "[e]ven if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence." *Id.*, slip op at 7, 11.

DEFICIENT PERFORMANCE

Applying *Frye* and *Lafler* to the facts of this case, defendant's claim that Barkovic provided ineffective assistance during plea negotiations lacks merit. The indeterminate facts in this case constitute a hybrid of *Frye*, in which the defendant complained of his trial counsel's failure to communicate a plea offer, and *Lafler*, in which the central problem was counsel's ineffective advice leading his client to reject an offer. The prosecution argues that, because both parties in *Lafler* conceded that the defendant's trial counsel provided ineffective assistance leading his client to proceed to a trial and conviction, *Lafler*, slip op at 7, 15, that case is inapplicable here because no such concession has been made. While it is true that *Lafler* offers no guidance with respect to the deficient-performance prong of the *Strickland* test because it was presumed that the defendant satisfied his burden of showing that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms, that only means that defendant must, as in any other claim of ineffective assistance of counsel, show that his attorney's performance was constitutionally deficient. The Sixth Amendment is not dormant until the prosecution files a formal offer; it applies "during plea negotiations," *Frye*, slip op at 8, including the May 14, 2009, pretrial hearing, during a recess in which Barkovic met with defendant and defendant's family in a court conference room.

Defendant argues that Barkovic failed to adequately explain the ramifications of pleading guilty to second-degree CSC, a compromise first proposed by the trial court and to which the assistant prosecutor, Kathleen Beard, signaled amenability pending approval from her office. But defendant cannot demonstrate that Barkovic's performance surrounding these talks was deficient because the weight of the evidence, excluding the self-serving affidavits of defendant and members of his family, indicates that any conversation concerning the possibility of pleading guilty to second-degree CSC would have been in vain. The prosecutor's explanation to the trial court, two months before trial commenced, that defendant "has always maintained his innocence in this matter and . . . wasn't interested in any plea offer" suggests that no plea-related conversation had been sought since the day of defendant's arrest, about eight months before that pretrial hearing. After this Court granted defendant's motion to remand for an evidentiary hearing on this and other issues, Beard and Barkovic each testified that, in their minds, no offer existed. Beard said that there was no point during her involvement with this case at which defendant did not "maintain[] his innocence," and that she was "willing to go seek [a deviation] if they were asking me to seek it," but "[i]t was never asked of [her]."

Under these narrow circumstances—defendant having insisted that he was innocent of each of the offenses the complainant claimed defendant committed on January 13 or 14, 2008—Barkovic discharged his duty to provide effective assistance when he informed defendant of the existence of a potential for an offer. The account of the meeting in the court conference room given by Patricia Bentley, defendant's wife, supports this conclusion: Barkovic said "there was a plea agreement offered that we needed to discuss," which was "to drop the first two counts and [defendant] would have to plead to the third count, which was second[-]degree." Perhaps tellingly, she did not say whether defendant said anything in his defense at this meeting. The other participants around the table, however, apparently agreed that an innocent person should not plead guilty. Barkovic's erroneous explanation that pleading guilty to second-degree CSC would require defendant to admit to "raping" the complainant—at most, defendant would have had to admit to touching her vaginal area over her clothing for sexual gratification—was not

objectively unreasonable given defendant's insistence that she had fabricated all of the allegations against him. However, it is not difficult to imagine a situation—for example, one in which a formal plea offer was extended and the defendant did not affirmatively claim that the complainant was lying—in which identical advice would be objectively unreasonable.

Although defendant has not shown a reasonable probability that he would have pleaded guilty to second-degree CSC, he should have been advised of the potential penalty for convictions on all charges. In *Douglas*, the defendant was convicted of first-degree CSC, MCL 750.520b(1)(a) (victim under 13 years of age) and second-degree CSC, MCL 750.520c(1)(a) (victim under 13 years of age). *Douglas*, 296 Mich App at 191. Although he faced a 25-year mandatory minimum sentence if convicted of first-degree CSC, his trial attorney erroneously advised him "that he could face up to a 20-year sentence, but would most likely be sentenced to a minimum term between 5 and 8 years in accordance with the sentencing guidelines . . . ." *Id.* at 206. This Court found that counsel's failure to inform the defendant of the mandatory minimum sentence "fell below an objective standard of reasonableness" because "the information regarding the mandatory minimum sentence was essential to enable [the] defendant to make an informed decision about whether to accept the prosecution's plea offer or proceed to trial." *Id.*, citing *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010).

In this case, defendant and the members of his family present during the meeting at the pretrial hearing said that defendant inquired of Barkovic regarding the penalty to which he would be subject if a jury found him guilty of all charges, and Barkovic dismissed the question, saying, "[M]e and you going [sic] to walk out that f-ing [sic] door together[;] they ain't got nothing." Barkovic admitted that he did not inform defendant of the penalty for a first-degree CSC conviction, but said that defendant did not ask that question, and that he provided defendant with a copy of the felony information, which advised defendant of a maximum penalty of life imprisonment for a conviction of first-degree CSC. Defendant at no point risked a mandatory minimum sentence, but *Douglas* reasonably stands for the proposition that the potential marginal punishment for an ill-fated gamble on a jury trial should contribute to a defendant's informed decision whether to pursue a plea offer.

While Barkovic's precautions, including providing defendant with copies of all documents related to the proceedings, such as the felony information, would probably have sufficed for a majority of his clients, defendant said that he has a third-grade education, cannot read, and uses a hearing aid. Barkovic should have taken steps to assure that defendant understood the penalty he faced in every possible contingency. The holdings of *Lafler*, *Frye*, and *Douglas* do not go so far as to establish a practical right to have one's counsel initiate plea negotiations, and there is no constitutional right to a plea bargain. See *Weatherford v Bursey*, 429 US 545, 561; 97 S Ct 837; 51 L Ed 2d 30 (1977). In any case, because the facts of this case are sufficiently distinct from those in *Douglas*—the relevant differences being the *Douglas* defendant's risk of a mandatory minimum penalty, his attorney's erroneous advice, and the existence, and rejection, of a formal plea offer—we need not decide whether Barkovic's performance fell below an objective standard of reasonableness because defendant was not prejudiced by any error.

PREJUDICE

Even if Barkovic's performance was deficient, defendant cannot show that he was prejudiced by any error. To mount a successful claim that ineffective assistance of counsel led to the rejection of a plea offer, a defendant must show three things: first, that, "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances)." *Lafler*, slip op at 5. There is no such probability in this case. Although defendant waited until the time of the evidentiary hearing to admit to Patricia that he "touched [the complainant's] butt over her clothing" "[o]nce" in "[a]pproximately November of 2007," he was not charged for that incident and continued to deny responsibility for the January 2008 allegations as late as August 2012.

The relevant counterfactual question is whether it is reasonably probable that defendant would have accepted a plea offer had Barkovic performed effectively. Assuming, for the limited purpose of answering this question, that an offer existed, and Barkovic fully explained the consequences of accepting and rejecting the offer, the likelihood that defendant would have accepted it is slight because his position at the time of the pretrial hearing was that he had never so much as touched the complainant inappropriately. His family believed him, taking the position that the complainant falsely accused him in retaliation for his recommending that she be placed at the Juvenile Justice Center of Macomb after the fight between the complainant and her grandmother, and recommended against pursuing a plea offer because they were confident in his innocence. Defendant has denied the January 2008 allegations for nearly five years, and only in the week preceding an evidentiary hearing he requested in the course of seeking a lesser sentence did he concede a completely unrelated sexual touching. He can show neither a reasonable probability that he would have accepted a plea offer had one been offered, nor that the prosecution would have agreed to allow him to plead guilty to an unreported, two-year-old instance of second-degree CSC far less severe than the ones for which he was charged,[1] while continuing to deny responsibility for the latter crimes.

Defendant's suspect timing in admitting to this new offense leads into the second requirement he must show under *Lafler*, which is that there is a reasonable probability that the court would have accepted the terms of the plea offer. *Lafler*, slip op at 5. "A factual basis to support a plea exists if an inculpatory inference can be drawn from what the defendant has admitted." *People v Fonville*, 291 Mich App 363, 377; 804 NW2d 878 (2011). It is not necessarily probable that the trial court would have found a factual basis for defendant's pleading guilty to second-degree CSC based on the 2007 touching. Though a guilty plea may be based on "the offense charged or the offense to which the defendant is pleading," MCR 6.302(D)(1); *People v Watkins*, 468 Mich 233, 238; 661 NW2d 553 (2003), the trial court would rightly have

[1] Given that defendant admitted he touched the complainant's buttocks for sexual gratification, the statutory criteria for second-degree CSC are met by this newly reported offense. See MCL 750.520c(1)(b)(*ii*); MCL 750.520a(q) (defining "sexual contact"); MCL 750.520a(e) (defining "intimate parts").

wondered why defendant, who insisted he did not sexually touch or penetrate the complainant in his pickup truck on January 13 or 14, 2008, would have admitted to a second, uncharged instance of second-degree CSC instead of pleading not guilty and seeking vindication at trial or pleading nolo contendere.

Defendant argues that Barkovic provided ineffective advice when he failed to define second-degree CSC and explain that admission to "sexual contact," not penetration, would have formed the factual basis for a plea of guilty of second-degree CSC. But had Barkovic done so, and defendant elected to plead guilty after learning the difference between first- and second-degree CSC, the trial court would have asked defendant to describe the way in which he committed second-degree CSC. He would not have answered, "I touched the complainant's vaginal area over her clothing in January 2008," because he said he was innocent of that as recently as August 24, 2012, and there is no rational reason he would have admitted to a 15-year felony he did not commit. Nor would he have answered, "I touched the complainant's buttocks in November 2007," because even if he did, he was not charged for that offense. If he knew he was guilty of the January 2008 penetration and touching, and he did not want to take the risk that a jury would convict him of all of the charges, he would have admitted, at least, to the January 2008 touching, if not the penetration. There then would have been a factual basis for a plea of guilty to second-degree CSC, but that is speculative because defendant told the trial court at the August 24, 2012, evidentiary hearing, that he was not prepared to admit to the January 2008 touching. Because defendant can show neither that he would have accepted a plea offer but for Barkovic's ineffective assistance, nor that the trial court would have accepted that offer, he suffered no cognizable prejudice on this issue.

Defendant next argues that two jurors' failure to disclose their histories of assaultive incidents during voir dire deprived him of a fair trial, and the trial court abused its discretion when it denied his motion for a new trial on that basis. We disagree.

"A trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion. An abuse of discretion occurs only when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). Criminal defendants have a constitutional right to be tried by an impartial jury. US Const, Am VI; Const 1963, art 1, § 20. Juror misconduct does not automatically warrant a new trial. *People v Strand*, 213 Mich App 100, 103; 539 NW2d 739 (1995). "A new trial will not be granted for misconduct unless it affects the impartiality of the jury," *id.* at 104, and actually prejudices the defendant, MCL 600.1354(1); *Miller*, 482 Mich at 548. Jurors are presumed to be impartial until the contrary is shown. *Miller*, 482 Mich at 550. "The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *Id.* "A juror's failure to disclose information that the juror should have disclosed is only prejudicial if it denied the defendant an impartial jury. [Defendants] are not entitled to a new trial unless the juror's failure to disclose denied [the defendants] their right to an impartial jury." *Id.* at 548-549 (internal citations and quotations omitted).

Juror Dragisa Nikolovski failed to disclose information that he should have disclosed. Questions from the trial court and defense counsel offered him opportunities to disclose the fact that he was threatened and physically assaulted, and he knew that the questions that were asked of other potential jurors applied to him. He acknowledged that Barkovic asked of the venire,

"[H]ave any of you been the victims of serious crimes or assaultive crimes?" He understood that this question, and the trial court's questions, referred not only to sexual assaults, but also to any crime. He admitted that he did not "say one word" about being involved in any kind of crime, whether as a victim or perpetrator. Juror Tammy Kotcher failed to disclose that she had been the victim of two incidents of domestic violence resulting in a personal protection order and criminal charges being filed against her husband, despite having been asked by Barkovic whether she had been "the victim of any crime(s)."

Defendant is not entitled to relief on the basis of juror misconduct, however, because he has not demonstrated that Nikolovski's or Kotcher's omissions "affect[ed] the impartiality of the jury," *Strand*, 213 Mich App at 104, by rebutting the presumption that jurors are impartial, *Miller*, 482 Mich at 550. Nikolovski testified that he did not intentionally withhold information from the court concerning a personal protection order, but did not mention it because it was "just something that happened while [he] was in college" and it "never occurred to [him] to bring it up." He said, during voir dire, that he understood the presumption of innocence to which defendant was entitled. Kotcher testified that she was not sexually assaulted, does not consider herself to be a victim, and thought that the voir dire questioning concerned only sexual assault. The trial court was satisfied that Nikolovski did not make a deliberate misrepresentation to the Court, and that Kotcher's testimony "indicate[d] she believed she was impartial, that her past adverse relations with her ex-husband had no bearing on her views of the alleged criminal activity in front of her, and that she could make an unbiased, correct decision." Because defendant introduced no evidence that suggested impartiality on the part of either juror, the trial court's denial of defendant's motion for a new trial was not "outside [the] principled range of outcomes," and, therefore, was not an abuse of discretion. *Miller*, 482 Mich at 544.

Defendant next argues that the trial court erred, during sentencing, when it assigned 10 points to offense variable (OV) 4, and that he received ineffective assistance of counsel because Barkovic failed to object to that score. We disagree.

If a minimum sentence is within the appropriate guidelines, this Court must affirm the sentence and may not remand for resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Gibbs*, 299 Mich App 473, 485; 830 NW2d 821 (2013). The Michigan Supreme Court has interpreted MCL 769.34(10) to mean that, "[w]hen the defendant's sentence is based on an error in scoring or based on inaccurate information, a remand for resentencing is required." MCL 769.34(10); *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010) (emphasis deleted). "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy/Glenn*, ___ Mich ___; ___ NW2d ___ (Docket Nos. 144327 and 144979, issued July 29, 2013), slip op at 6-7.

We note that defendant expressly waived, in the trial court, his argument that OV 10 was improperly scored. At an October 29, 2012, hearing, the trial court said that defense counsel filed a letter on September 21, 2012, stating that he "ha[d] not filed a supplemental brief on

[o]ffense [v]ariable ten" because he "concluded that [his] esteemed adversary . . . was correct in her argument on this issue."[2] Defendant did not object or otherwise correct that statement.

MCL 777.34 provides:

> (1) Offense variable 4 is psychological injury to a victim. Score offense variable 4 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Serious psychological injury requiring professional treatment occurred to a victim[:] 10 points
>
> (b) No serious psychological injury requiring professional treatment occurred to a victim[:] 0 points
>
> (2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

See also *People v Waclawski*, 286 Mich App 634, 681; 780 NW2d 321 (2009).

In *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012), this Court held that the "victim's statements about feeling angry, hurt, violated, and frightened" supported a score of 10 points for OV 4. At defendant's sentencing hearing, the complainant said:

> When you raped me, I felt dirty, alone, scared, betrayed, nasty[,] and the list of emotions goes on and on. You ruined a big piece of life. All the words in the dictionary can't express how you made me feel. Not only did you take my family away from me, you turned them against me because of something you did to me, and I'll never get them back. You ripped my family apart.
>
> When you raped me, I didn't know what to do. All I knew was to get high so I didn't have to face the fact. I know [sic] have very big trust issues with males . . . and it's going to take me a long time to trust another male. . . . This isn't half of my emotions. I can't express them all on paper.

The complainant's mother, in the victim impact statement portion of the presentence investigation report, said that the complainant

[2] The letter to which the trial court referred is not included in the lower court file. However, the online Macomb Circuit Court register of actions indicates that defendant filed, on September 21, 2012, "correspondence to [the] court & Judge Chrzanowski." OV 10 is not included in defendant's supplemental brief after remand.

> has been impacted by the defendant's behavior in that she is abusing drugs; is completely out of control behaviorally; that she is unable to maintain any emotional relationships with family and friends; that she isolates herself from social contacts; is emotionally depressed; is extremely distraught over the loss of her extended family because she pursued prosecution of the defendant; and that she attempted suicide on [August 12, 2009]. [She] further advised that [the complainant was] currently involved in group and individual counseling; is seeing a psychiatrist; and is seeing a neurologist, who is monitoring her as a result of her psychotropic medicine use.

This evidence was sufficient to support a score of 10 points for OV 4. Contrary to defendant's argument, evidence of actual treatment for post-offense psychological injury is not necessary. See *Waclawski*, 286 Mich App at 681. In any case, Jennifer Cole, the complainant's counselor and therapist, testified that the complainant was "diagnosed as depressed," and that her treatment plan included an additional "goal to address her victimization," and the complainant's mother's victim impact statement indicated that she is involved in a broad range of treatment. Even if defendant's argument concerning OV 4 was successful, the new OV score would not lower his guidelines range.[3] Because defendant's minimum sentence was within the proper guidelines range, and defendant has shown neither any scoring error nor that the trial court relied on inaccurate information, his sentences must be affirmed. See MCL 769.34(10); *Gibbs*, 299 Mich App at 485.

Relatedly, defendant's argument that his trial counsel was ineffective for failing to object to the trial court's scoring of OV 4 lacks merit. To be eligible for relief on the basis of ineffective assistance of counsel, defendant must show that "(1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Uphaus*, 278 Mich App at 185. Effective assistance does not require trial counsel to make futile objections. *People v Unger*, 278 Mich App 210, 242, 256-257; 749 NW2d 272 (2008). Because there was sufficient evidence to support a score of 10 points for OV 4, defendant cannot show that he was prejudiced by his trial counsel's failure to object to that score.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Kathleen Jansen

[3] Defendant's PRV level is C, and his original OV score was 50, corresponding to an OV level of III. Had OV 4 been scored zero, as he urges, his total OV score would have decreased to 40, but his OV level would have remained III, resulting in the same guidelines range of 81 to 135 months. See MCL 777.62.